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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-6673

ZACKARY C. BROWN,

Appellant

v.

THE STATE OF TEXAS.

Appeal from the County Court at Law
Number Two
El Paso County, Texas

BRIEF OF APPELLANT

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IN THE

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No. 77-6673

ZACKARY C. BROWN,

Appellant,

v.

THE STATE OF TEXAS.

Appeal from the County Court at Law Number Two
El Paso County, Texas

BRIEF OF APPELLANT

This is a direct appeal from the County Court at Law Number Two for El Paso County, Texas. Appellant was charged by information in that court with failure to identify himself, in violation of Section 38.02(a) of the *Texas Penal Code.* Appellant moved to set aside the information because Section 38.02(a) was unconstitutional on its face as vague and overbroad, because it punished protected expression, invaded the right to privacy, and because it compelled

speech when the Constitution protected silence. The trial court denied the motion but questioned the constitutionality of the statute. In a non-jury trial, Appellant was found guilty as charged and was fined $45.00. Because the Texas Court of Criminal Appeals hears only those cases where the fine exceeds $100.00, a direct appeal was taken to this Court. On October 16, 1978, this Court noted probable jurisdiction.

A. REPORTS

The County Court at Law Number Two is a court of record but wrote no opinion in this case. Because it is not an appellate court, none of its proceedings are recorded in official or unofficial reporters. The statute in question has never before been reviewed by an appellate court.

B. JURISDICTION

Appellant was charged with violating Section 38.02(a) of the *Texas Penal Code* in that he allegedly refused to give a report of his name and residence address to a peace officer who had lawfully stopped him and requested the information. Appellant was fined the sum of $45.00 (App. 6). The judgment of the County Court at Law Number Two was entered on February 1, 1978 (App. 6). A Notice of Appeal was filed with that court on February 3, 1978 (App. 10)

and an Amended Notice of Appeal was filed on February 14, 1978 (App. 13).

This Court has jurisdiction by virtue of Section 1257(2), Title 28, *United States Code,* which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court .... [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The judgment of the County Court at Law in this case is a decree rendered "by the highest court of a State in which a decision could be had," because pursuant to Article 4.03 of the *Texas Code of Criminal Procedure,* no appeal may be had to the Texas Court of Criminal Appeals where the fine imposed does not exceed $100.00. Article 4.03 of the *Texas Code of Criminal Procedure* provides as follows:

> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars.

The Texas Court of Criminal Appeals has previously held that where one is fined less than $100.00 in a county court at law, there is no appeal to the Texas Court of Criminal Appeals. *Coates* v. *State of Texas,* 308 S.W.2d 869 (Tex.Ct.Crim.App. 1957).

C. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In this appeal Appellant questions the constitutionality of Section 38.02 of the *Texas Penal Code,* which provides as follows:

§ 38.02. FAILURE TO IDENTIFY AS WITNESS

(a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

That statute may be found at page 68, Volume 4, of the *Texas Penal Code, Vernon's Texas Codes Annotated.*

This case also involves the following amendments to the Constitution of the United States of America:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. QUESTIONS PRESENTED

QUESTION I: Section 38.02(a) of the *Texas Penal Code* violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is vague and overbroad on its face.

QUESTION II: Section 38.02(a) of the *Texas Penal Code* is unconstitutional because it punishes conduct protected by the First Amendment to the United States Constitution.

QUESTION III: Section 38.02(a) of the *Texas Penal Code* is unconstitutional because it violates the Fourth Amendment to the United States Constitution as making lawful unwarranted invasions to one's right of privacy.

QUESTION IV: Section 38.02(a) of the *Texas Penal Code* is unconstitutional and in violation of the Fifth Amendment to the United States Constitution because it compels speech under pain of arrest when the Constitution protects silence.

E. STATEMENT OF THE CASE

Shortly after noon on December 9, 1977, El Paso Police Patrolman Venegas and his partner were driving on Magoffin Street in the City of El Paso. They were patrolling the area and saw Appellant, Zackary Brown, walking down an alley. Another person was seen walking in the alley, but the officers could not state that Appellant and the other pedestrian had met or had talked to each other (App. 23, 24).

The officers drove into the alley, stopped Appellant, and asked him his name and what he was doing in the alley. Appellant refused to give his name. Appellant was arrested. The officer noted that Appellant is a black male in the mid-20's (App. 27) and that he stopped Appellant because he had not seen him in the area before (App. 24). The officer admitted that many blacks are found in that area of town. The officer stated that he suspected no crime or that Appellant was armed (App. 28), but that he just wanted to stop and ask Appellant his name (App. 28). Appellant was patted down and was taken to the jail for booking. No contraband or weapons were discovered in any search (App. 29, 31).

On the way to jail Appellant did tell the officers his name, but he was still booked. The officer noted that the violation was already complete (App. 32).

F. SUMMARY OF ARGUMENT

1. Section 38.02(a) of the *Texas Penal Code* is void because it is vague and overbroad on its face. The statute employs words, "lawfully" and "stops," which create confusion and which are not words that are commonly understood. The statute is lacking in ascertainable standards of guilt so as to give reasonable notice of the conduct which it seeks to prohibit. Section 38.02(a) is broad on its face because it punishes protected conduct. Most probably the law was intended to apply to material witnesses, but as written the statute applies to witnesses and nonwitnesses alike.

2. Section 38.02 of the *Texas Penal Code* is void because it seeks to punish conduct protected by the First Amendment. Under previous decisions of the Court it has been held that one has the right to refuse to answer questions from the police, to question a police stop, and perhaps to walk away while a policeman is asking questions.

3. Section 38.02(a) of the *Texas Penal Code* is invalid because it makes lawful unwarranted intrusions into one's right of privacy. The statute appears to allow investigatory stops or detentions on grounds less than those set out in *Terry* v. *Ohio*. The statute compels a person to answer questions under pain of arrest. In sum, the statute allows police to intrude under *any* circumstances and demand a person to identify himself. The statute was not drawn in such

a manner which would protect those state interests which the legislature apparently was seeking to advance.

4. Section 38.02(a) of the *Texas Penal Code* is void because it compels speech when the Constitution protects silence. It is illogical to allow the arrest of a person for silence, and then advise the arrestee, per *Miranda*, that the arrestee then has the right to remain silent. The right to remain silent is obviously present before arrest, except in some limited cases where, in order to advance strong governmental interests, individual rights might be subordinated.

G. ARGUMENT

QUESTION I: Section 38.02(a) of the *Texas Penal Code* violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is vague and overbroad on its face.

This Court has held for a number of years now that most of the clauses of the First, Fourth, and Fifth Amendments to the United States Constitution are applicable to the states through the Fourteenth Amendment Due Process Clause. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); and *Malloy* v. *Hogan*, 378 U.S. 1 (1964).

In addition to those rights, this Court has also held that certain fundamental and procedural due process

rights were applicable to the states through the Fourteenth Amendment Due Process Clause. Among those is the requirement that penal statutes be drafted in such a manner that the conduct which they purport to prohibit is clearly known from a reading of the statute.

The requirement of certainty in state penal provisions was noted by this Court in *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926), in which this Court stated as follows:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

See also *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

In one of the most publicized decisions of this Court, it was held in *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966), that a person has a constitutional right to remain silent. Indeed, it was the first of several rights which were listed by this Court and which

this Court held must be told to a person placed under arrest. It would not be an exaggeration to state that the man on the street, the layman, would believe that the right to silence was his to invoke.

Nevertheless, a reading of Section 38.02(a) gives no guidance concerning the circumstances which would give rise to the application of Section 38.02(a) in light of one's right to silence. The statute requires one to give a report of his name and address when "lawfully stopped" by a peace officer. What does "lawfully stopped" mean? Is there any question but that "men of common intelligence must necessarily guess at its meaning and differ as to its application?" *Connally* v. *General Const. Co., supra.* Obviously, courts have struggled with the concepts of "stops," "detentions," and "arrests" for so many years that the terms themselves are vague to lawyers, Supreme Court justices, and obviously to laypersons. And even more complex and confused is the meaning of the term "lawfully." Its meaning is so subjective and so imprecise that one might reasonably feel that he was not lawfully stopped, and therefore Section 38.02(a) was inapplicable to him. For example, in *Norwell* v. *Cincinnati*, 414 U.S. 14 (1973), Norwell, a 69-year-old gentleman, was stopped by a policeman while he was walking home. The police officer had received a report that there was a "suspicious man" in the neighborhood. When approached by the policeman who wished to stop and question him, Norwell told the officer: "I don't tell you people anything." He was then

placed under arrest for disorderly conduct. This Court reversed the conviction, stating:

> Upon this record, we are convinced that petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him. Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.

414 U.S. at 16.

So apparently, as in this case, one does have the right to question a stop, at least verbally. In this case there was not even a "suspicious person" report. All we have is an officer's curiousity. Therefore, there is no fair notice that refusal to answer an officer's questions would be a violation. *United States* v. *Harriss,* 347 U.S. 612 (1954).

A statute which is vague and which is lacking in ascertainable standards of guilt so as to give a reasonable notice of the conduct which is prohibited is unconstitutional. *Palmer* v. *Euclid,* 402 U.S. 544, 545 (1971).

In addition to facial vagueness, Section 38.02(a) is unconstitutional because it is overbroad on its face. A statute may be attacked for facial vagueness and overbreadth even if it appears valid as applied to the conduct of the accused raising the issue. *Plummer* v. *Columbus,* 414 U.S. 2 (1973).

Clarity must exist not only as discussed in the vagueness problem above, but also in the scope of application of the statute. Where a statute possibly makes criminal protected conduct, it is overbroad. *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *Plummer* v. *Columbus, supra;* and *Hess* v. *Indiana,* 414 U.S. 105 (1973). In cases involving First Amendment rights, this Court has traditionally looked much closer at any statute potentially infringing on such protected activities. Those laws possibly punishing First Amendment protected speech or expression must be "narrowly drawn to prevent the supposed evil." *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966); and *Keyishian* v. *Bd. of Regents of U. of St. of N.Y.,* 385 U.S. 589 (1967).

With respect to Section 38.02(a), it is possible that a similar statute could have been drafted so as to cure its overbreadth. The caption of the section states: "Failure to Identify as Witness," but the body of the provision does not mention the word "witness." The section on its face applies to everyone, witnesses and nonwitnesses alike. There is, however, an indication that the overbreadth was not intended by the legislature.

Section 38.02(a) replaced Article 2.24 of the *Texas Code of Criminal Procedure,* which was repealed in

1973 upon the enactment of Section 38.02(a). Article 2.24 provided as follows:

IDENTIFICATION OF WITNESSES

> Whenever a peace officer has reasonable grounds to believe that a crime has been committed, he may stop any person whom he reasonably believes was present and may demand of him his name and address. If such person fails or refuses to identify himself to the satisfaction of the officer, he may take the person forthwith before a magistrate. If the person fails to identify himself to the satisfaction of a magistrate, the latter may require him to furnish bond or may commit him to jail until he so identifies himself.

This old Article 2.24 which was repealed has several useful points not found in new Section 38.02(a). First, it specifically states that the officer must have reason to believe that a crime was committed. Second, it was not a penal statute and did not give the officer the unfettered right to place a subject under arrest for the mere refusal to speak. Third, a neutral and detached magistrate made the final decision, and presumably if the officer could not show that the subject was a witness to a crime, not even the magistrate could compel the subject to state his name.

New Section 38.02(a) has none of the foregoing protections and can apply to anyone whether a crime was committed or not. This Court has long recognized the right of a state to question material witnesses to a crime, and indeed, to detain them if necessary. *Stein*

v. *New York*, 346 U.S. 156, 184 (1953). See also, Rule 46(g), *Federal Rules of Criminal Procedure*, and Section 3149, Title 18, *United States Code*. In expanding the statute here beyond the reach of material witnesses, the legislature made the statute too broad and, therefore, unconstitutional because the new statute then made criminal conduct protected by the First, Fourth, and Fifth Amendments as applied to the states through the Fourteenth Amendment Due Process Clause.

QUESTION II: Section 38.02(a) of the *Texas Penal Code* is unconstitutional because it punishes conduct protected by the First Amendment to the United States Constitution.

In several decisions this Court has held that the Fourteenth Amendment Due Process Clause makes applicable the First Amendment to the United States. *Gitlow* v. *New York*, 268 U.S. 652 (1925); *Near* v. *Minnesota*, 283 U.S. 697 (1931); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937); *Thornhill* v. *Alabama, supra; Cantwell* v. *Connecticut, supra;* and *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). The First Amendment rights include not only the right to free speech, but also the right to symbolic speech as well. *Tinker* v. *Des Moines*, 393 U.S. 503 (1969).

This Court has, however, declined to state that one has an absolute right of free speech, and in several

decisions various types of speech have been excluded from the protective reach of the First Amendment. For example, advocating criminal behavior with the intent to incite others to criminal action, *Dennis* v. *United States,* 341 U.S. 494 (1951); and *Yates* v. *United States,* 354 U.S. 298 (1957); libel, *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952); obscenity, *Roth* v. *United States,* 354 U.S. 476 (1957); and fighting words, *Cantwell* v. *Connecticut, supra;* and *Chaplinsky* v. *New Hampshire, supra.*

This Court has developed a balancing test to weigh the policy encouraging freedom of expression against whatever the state interest was asserted in the particular case. The test was stated in *United States* v. *O'Brien,* 391 U.S. 367, 376 (1968):

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction

> on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Whatever the words used, in addition to being outside the protection of the First Amendment, they must lead a court to believe that their utterance caused a clear and present danger. *Schenck* v. *United States,* 249 U.S. 47 (1919).

The right to freedom of expression protected and encouraged by the First Amendment does not mean that the speech or expression will be pleasing to those who see or hear it. *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949). Merely uttering strong and displeasing words, even profane ones, when there is no clear and present danger does not mean that one may be prosecuted. See, *Eaton* v. *City of Tulsa,* 415 U.S. 697 (1974), in which this Court reversed a contempt conviction where the accused said "chicken-shit" in court; *Hess* v. *Indiana, supra,* in which this Court reversed a conviction under the Indiana disorderly conduct statute where the accused told a crowd at an antiwar demonstration: "We'll take the fucking street later (or again);" or *Wiegand* v. *Seaver,* 504 F.2d 303 (5th Cir. 1974), in which the Court reversed a conviction under the Florida disorderly conduct statute for having caused a disturbance in a saloon and uttering the words "goddamn son-of-a-bitch." See also, *Plummer* v. *Columbus, supra,* where a cab driver made "a series of absolutely vulgar, suggestive, and abhorrent, sexually-oriented statements" to his passenger. In *Plum-*

mer, however, the statute was held void on its face, even though the speech involved might not have been protected.

Here we have a case in which, at most, Appellant questioned the legality of the stop and the motives of the officers in making the stop. But he was not arrested for the conduct, according to the officer. Rather, he was arrested for refusing to answer questions. This Court is capable of recognizing the abuse by law enforcement of citizens who question authority; it has on several occasions taken notice of such an abhorrent practice. *Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968); *Gutkencht* v. *United States,* 396 U.S. 295 (1970); and *Norwell* v. *Cincinnati, supra.*

Other than to satisfy an officer's curiousity and then his vindictiveness when Appellant refused to speak, what are the interests of the state which could override the right to remain silent here and say nothing or to question the authority of police? This is the question which the state will address in its brief, but in the court below the prosecutor noted the state's interests to be the following:

> Well, the Governmental interest to maintain the safety and security of the society and the citizens to live in the society, and there are certainly strong Governmental interests in that direction and because of that, these interests outweigh the interests of an individual for a certain amount of intrusion upon his personal liberty. I think these Governmental interests outweigh the individual's interests in this respect, as far as simply asking an individual for his name and address under the proper circumstances.

(App. 16).

> I think in a way not identifying oneself tends to thwart the police power. Because, for instance, if an individual has committed a crime and if he refuses to identify himself, that tends to thwart the process.

(App. 17).

The interests listed by the prosecutor clearly are inapplicable in this case, and the statute is not drawn in such a manner to protect only those state interests. First, there was not even an allegation by the state that there was any danger posed here to anyone's security. Second, since no crime was even suspected, there could be no "thwarting" of the process where an individual committed a crime and refused to identify himself.

Perhaps in its brief before this Court, the state can list some other interests which might apply here. But given those which were listed below, under the *O'Brien* test, forcing one to divulge his name and address to satisfy an officer's curiosity when no crime was even suspected does not further "an important or substantial governmental interest. . . ."

This case is governed by this Court's decision in *Norwell* v. *Cincinnati, supra,* in which it was held that

one cannot "be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer." Such words were constitutionally protected speech.

Inasmuch as this statute as applied here and on its face punishes speech and nonspeech which is clearly protected, the statute is invalid.

QUESTON III: Section 38.02(a) of the *Texas Penal Code* is unconstitutional because it violates the Fourth Amendment to the United States Constitution as making lawful unwarranted invasions to one's right of privacy.

Although this discussion comes under the Fourth Amendment, it should be noted that the right of privacy recognized by this Court long ago is not only protected by the Fourth Amendment, but also comes under the shelter of the other Amendments. In *Griswold* v. *Connecticut*, 381 U.S. 479, 483-484 (1965), this Court Stated that "... the First Amendment has a penumbra where privacy is protected from governmental intrusion," and that several other "guarantees create zones of privacy," including the First, Third, Fourth, Fifth, and Ninth Amendments.

This right of privacy, however, will be discussed in this section, as discussion of that right has generally revolved around Fourth Amendment problems.

There are those who believe that one's right to privacy, if it exists at all, begins and ends in the home.

The right to be free from police questioning, eavesdropping, and surveillance clearly becomes less absolute once a person leaves his home, or where the person is on the street, in a car, or in public places. No specific rule has been laid down, but generally this Court has held that the Fourth Amendment protects those things which most of us might consider to be private even if the police did not intrude into one's property. *Katz* v. *United States*, 389 U.S. 347 (1967); and *Silverman* v. *United States*, 365 U.S. 505 (1961).

In abandoning the concept that the right to privacy is protected only within one's property, this Court followed the general principles espoused by Justice Brandeis in his early well-known article, "The Right of Privacy," 4 Harvard L. Rev. 193 (1890), and later in his dissent in *Olmstead* v. *United States*, 277 U.S. 438, 478-479 (1928). In *Olmstead*, Justice Brandeis was advocating a broader concept of the right to privacy, one not limited by concepts of property law or any other law, but rather guided by a notion that a person's liberty and freedom were to be protected in many different ways from unreasonable and unwarranted intrusions. Written in 1928, and quoted hundreds of times since then, the concept was stated as follows:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain,

> pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Necessarily, and in line with Fourth Amendment cases generally, the right to privacy, or the right to be free from arrest or detention when there is no indication that a crime has been committed, or to be free from searches or seizures on grounds less than probable cause, are measured against the intrusions involved with a standard of reasonableness. With some limitations, the greater the need of the state to intrude and the closer one comes to having probable cause, the more likely it will be that the intrusion will be upheld. Reasonableness, like privacy, is a fluid concept. *Harris* v. *United States,* 331 U.S. 145 (1947).

Does the Constitution today protect citizens from unwarranted detention based on less than probable cause solely because of law enforcement claims that they desire such detentions? Again, with some very limited exceptions, the answer is that the Constitu-

tion does grant that security. *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Spinelli* v. *United States,* 393 U.S. 410 (1969); *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Draper* v. *United States,* 358 U.S. 307 (1959); and *Brinegar* v. *United States,* 338 U.S. 160 (1949). This Court has allowed a few, but limited, exceptions to the requierment for probable cause, such as consent, *United States* v. *Watson,* 423 U.S. 411 (1976); border searches, *United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976); hot pursuit, *Warden* v. *Hayden,* 387 U.S. 294 (1967); "stop and frisk," *Terry* v. *Ohio,* 392 U.S. 1 (1968); and inventory searches, *Cooper* v. *California,* 386 U.S. 58 (1967).

Section 38.02(a) allows the arrest of a person where there is no indication that the accused has either committed or witnessed a crime, or indeed, when there is no indication that anything, civil or criminal, has occurred. It is principally used to give an officer a pretext for an arrest or search, when no other violation can be found. In at least one case it has been reported that officers have refused to accept certain types of identification in addition to verbal reports to identification. *Heath, et al.* v. *Brown, et al.,* No. CA-4-77-204 (N.D. Tex.).

This Court has reviewed a number of similar statutes which allow arrests for conduct which falls short of conduct one might consider criminal. In some cases states have attempted to make criminal neutral activities such as loafing or sitting, or walking with no particular purpose. In those vagrancy or suspicious

person cases, this Court held the ordinances void for vagueness. But in doing so this Court necessarily recognized that there are many types of conduct which cannot be criminal, regardless of their characterization.

> The difficulty is that these activities [walking, strolling, wandering, loafing, loitering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-conficence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Papachristou v. *Jacksonville, supra,* at p. 164. See also *Palmer* v. *Euclid, supra.*

This Court, for many years, has recognized the right of citizens in this country to speak out, even when obnoxious, to walk, even when it seems to others to have no purpose, and to preach, even when others do not care to listen. Obviously, as in *Norwell,* one has the right to protest a questionable detention or attempted interrogation. In all these cases, therefore, this Court has recognized several activities which are beyond the reach of penal statutes. Those rights are part of our general "right to be let alone." Certainly,

silence, when there is no compelling reason to speak, is one of those. If we protect the right of some to use profane speech, can the right to silence be any less secure?

It might be said by the state here that the Fourth Amendment only applies after arrest and that here we are only dealing with a "stop." But in *Davis* v. *Mississippi,* 394 U.S. 721, 726 (1969), this Court rejected a similar notion and held "that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' "

Section 38.02(a) allows a peace officer to demand that any person identify himself regardless of his activity, or the circumstances. The demand could take place in a saloon or a synagogue, an office or a mill. The state, at least so far, has not justified the scope of Section 38.02(a). The state has, however, in its Motion to Dismiss or Affirm, shrugged off the potentially offensive sweep of the statute by stating that intrusions under the statute are "modest." This is a familiar argument. But this Court has usually been vigilant to the fact that if we were ever to lose our liberty and freedom completely, it would occur not at once, but one small step at a time. We are not vigilant enough to combat "modest" incursions into and limitations of our freedom.

> Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers.

> The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. *United States, supra,* at p. 479 (dissent by Brandeis).

So the state argues in its motion that there is a right to "stop and frisk," for example, under *Terry* v. *Ohio, supra. Terry* v. *Ohio* does give the police such a right, but in that case at least two factors were significantly different: (1) the officer suspected that the suspects were "casing the job," and (2) the officer had reason to believe that the suspects were armed. Neither of those factors was present in this case, nor does Section 38.02(a) provide that there must be any indication of a crime or danger for the provisions of that statute to apply.

Terry v. *Ohio* is a difficult case. This Court in that decision has allowed stops and limited searches on something less than probable cause. One cannot justify that decision under the Fourth Amendment. About the only way to explain it is that this Court, as a practical matter, decided to allow police officers a measure of safety while they stopped a person to question him.

A policeman, just like any person, can ask a person to stop to answer questions. It may be good police work to stop and ask questions. *Palmer* v. *Euclid, supra,* at p. 546. But what can a policeman do when the subject refuses to answer questions and just

walks away? The answer is that the policeman can do nothing and a person has the right to walk away, unless there is reason to believe that the accused committed a crime other than refusing to answer. In *Norwell* v. *Cincinnati, supra,* this Court held that a person may question an arrest and walk away. In *Palmer* v. *Euclid, supra,* at p. 546, this Court stated:

> A policeman has a duty to investigate suspicious circumstances, and the circumstance of a person wandering the streets late at night without apparent lawful business may often present the occasion for police inquiry. *But in my* [*Harlan*] *view government does not have constitutional power to make that circumstance, without more, a criminal offense.* (Emphasis added)

In *Davis* v. *Mississippi, supra,* at p. 727, fn. 6, Justice Brennan wrote for the majority:

> The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. [Citations omitted] But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

In *Terry* v. *Ohio, supra,* at p. 34, Justice White, concurring wrote:

> There is nothing in the Constitution which prevents a policeman from addressing questions to

> anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

See also, *State* v. *Tsukiyama,* 525 P.2d 1099 (Hawaii, 1974); *State* v. *Baxter,* 413 P.2d 638 (Wash. 1966); and ALI, Model Code of Pre-Arraignment Procedure (Draft No. 1), Article 110, Section 110.1(1).

So, at least by dictum, this Court has considered situations like that presented in this case and has stated that one can indeed walk away. In *Norwell* the Court's decision was that one had the right to walk away.

So the "modest intrusion" of requiring one to anwser questions against his will is not condoned. And where a vehicular stop is concerned, this Court has stated that random stops away from the border or at places not the funcitonal equivalent of the border are not condoned. Section 38.02(a) is not limited to pedestrians. It can be used to stop vehicles as well.

In *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 880, 883 (1975), this Court was invited by the government to allow it to stop anyone near the Mexican border and inquire about their citizenship when those persons appeared to be of Mexican ancestry. Justice Powell wrote for the majority:

> The intrusion is modest. The Government tells us that a stop by a roving patrol 'usually consumes no more than a minute.' . . . According to the Government, '[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'
>
> * * * * *
>
> Although we may assume for purposes of this case that the broad congressional power over immigration . . . authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

So unless there is reasonable suspicion that a crime has been committed, this Court does not allow random

stops for questioning away from the border or its functional equivalent. *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973); *United States* v. *Ortiz,* 422 U.S. 891 (1975); and *United States* v. *Martinez-Fuerte, supra.*

Now that we see that the broad right of privacy does protect silence, how can the police compel speech? Ever since *Boyd* v. *United States,* 116 U.S. 616 (1886), it has been recognized that compelling production of documents when the Constitution protects silence is a violation both of the Fourth and Fifth Amendments. See also, Brandeis dissent in *Olmstead* v. *United States, supra.*

QUESTION IV: Section 38.02(a) of the *Texas Penal Code* is unconstitutional and in violation of the Fifth Amendment to the United States Constituion because it compels speech under pain of arrest when the Constitution protects silence.

The issues in this case are all so related that it is difficult to cut off discussion of one to start discussion of the other, for necessarily there is a great deal of overlapping. Like the other Amendments, Fifth Amendment protections secured by the Self-Incrimination Clause have been made applicable to the states through the Due Process Clause of the Fourteen Amendment. *Malloy* v. *Hogan, supra.*

The scope of protection provided by the Fifth Amendment is not and probably cannot be defined

with any certainty. Courts should, however, err in favor of the invocation of the privilege. O. J. Rogge, *The First and the Fifth* (Nelson: N.Y., 1960), pp. 188-190. Although the Fifth Amendment itself appears to be couched in terms which would lead one to believe that its terms are absolute, decisions of this Court have held the contrary and have employed a balancing test, weighing the state interests or claims on the one hand against the invocation of the privilege on the other. *California* v. *Byers,* 402 U.S. 424 (1971).

Although this Court has held as a general proposition that one cannot be punished for the act of invoking a constitutional right, *See* v. *Seattle,* 387 U.S. 541 (1967); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967); *Albertson* v. *SACB,* 382 U.S. 70 (1965); *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968); *Haynes* v. *United States,* 390 U.S. 85 (1968); and *Leary* v. *United States,* 395 U.S. 6 (1969), there are instances where, because of governmental needs which this Court felt, as a practical matter, were paramount, this Court has subordinated Fifth Amendment claims. *California* v. *Byers, supra; United States* v. *Sullivan,* 274 U.S. 259 (1927); and *Shapiro* v. *United States,* 335 U.S. 1 (1948).

The state has argued previously here that the state may compel the disclosure of one's name and address because that is not testimonial or communicative and is, therefore, not protected by the Fifth Amendment.

In *Schmerber* v. *California,* 384 U.S. 757 (1966); and *Warden* v. *Hayden, supra,* this Court did allow the use of blood and clothing seized from the accused, and the Court specifically left open the question whether there was some evidence which an accused could not be compelled to produce. What comes from one's lips is testimonial and communicative, *Wigmore,* to be contrasted from compelling the production of words or actions solely because they are physical characteristics. *United States* v. *Wade,* 388 U.S. 218 (1967); *United States* v. *Dionisio,* 410 US 1 (1973); *Gilbert* v. *California,* 388 U.S. 263 (1967); *United States* v. *Mara,* 410 U.S. 19 (1973); and *Cupp* v. *Murphy,* 412 U.S. 291 (1973).

A person's identity can be testimonial and communicative, and it can be incriminating at least in the sense that it can provide a link which might enable the state to obtain other incriminating evidence. *United States* v. *Scios,* 23 Cr. L. Reporter 2424 (D.C. Cir. July 21, 1978); *Gissendanner* v. *Wainwright,* 482 F.2d 1293 (5th Cir. 1973); and *United States* v. *Miller,* Nos. EP-78-CR-19, -20 (W.D. Tex., May 31, 1978), government appeal pending (No. 78-2274, 5th Cir.).

The real question, however, is whether the claims of the state here are compelling enough so that the right of silence on the part of Appellant must give way. Here again, the case of *Norwell* v. *Cincinnati, supra,* comes closest to this case. And in this case the claims of Appellant are even stronger than those in

Norwell, as here there was no suspicious person report and the occurrences took place in daylight. In *California* v. *Byers, supra,* this Court did review the constitutionality of the California "hit and run" statute which required drivers of vehicles involved to stop and give a report of their name and address. This Court noted that all 50 states have similar statutes.

Much as the *Sullivan* and *Shapiro,* and indeed as in *Terry* v. *Ohio,* this Court has made a practical decision that the interests of the state in "hit and run" cases are so strong that some rights would be subordinated. When one drives a vehicle, some rights will be preempted. For example, by the mere fact that one drives one may subject himself to certain license checks, vehicle inspection, searches at the border or equivalents of the border, blood tests, breathalyzer tests. Without question, this Court has recognized a strong interest in the state to regulate drivers and vehicles. *Hess* v. *Pawloski,* 274 U.S. 352 (1927); and *Kesler* v. *Dept. of Public Safety,* 369 U.S. 153 (1962). Those interests of the state are simply not present in this case, and Section 38.02(a) is not drafted in such a manner to protect those interests without penalizing protected conduct. The strong interest in government to be able to raise an army allowed the government to require registration with the Selection Service Board, and made mandatory the possession of certificates evidencing that registration. *United States* v. *O'Brien, supra;* and Section 462(b), Title 50, *United States Code.*

Section 38.02(a) applies to motorists and nonmotorists alike. In this case it was applied to a pedestrian. While the state undeniably may have the right to have cerain information about motorists, it has never been contended that a similar right exists over pedestrians. So far, to be a pedestrian, one needs no license and one is not regulated by the state. So in using the balancing test approach, what interest, other than that of curiousity, does the state intend to advance in allowing the random stop of pedestrians to demand a report of the person's name and address?

Section 38.02(a) clearly compels speech. It provides no meaningful guidance restricting its use. It advances no discernable, reasonable state interest. It provides the police with a weapon to punish protected conduct and to use the statute in a capricious and arbitrary manner.

In view of all the publicity about the *Miranda* decision, one could expect that the public might believe that one does indeed have the right to remain silent. If one has the right to remain silent after arrest, surely the invocation of that right prior to arrest should not furnish the basis for the arrest itself so that the officer can then advise the arrestee that he then has the right to remain silent. Thus, the position of the state here is that one must be arrested in order to have the right to remain silent, a thoroughly confusing and obviously illogical contention.

Conclusion

For all of the foregoing reasons, Appellant urges this Court to reverse his conviction and to declare Section 38.02(a) of the *Texas Penal Code* void on its face.

Respectfully submitted,

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